

**IN THE DISTRICT COURT
AT WHANGAREI**

**TTT-2010-044-000994
[2016] NZDC 15015**

BETWEEN TENANCY PRACTICE SERVICES
 LIMITED as debt collection agent for
 DON BRUCE BOGUE REAL ESTATE
 LIMITED
 Judgment Creditor

AND WAVENZ LIMITED
 Judgment Debtor

Hearing: 1 March 2016

Appearances: Mr Scotney Williams for the Judgment Creditor
 Mr Viviane for the Judgment Debtor

Judgment: 31 March 2016

RESERVED JUDGMENT OF JUDGE D J McDONALD

Background

[1] On 6 August 2010 an order was made by the Tenancy Tribunal against Mr Viviane, personally, for unpaid rent he owed (that is disputed by Mr Viviane) on a property at Warkworth[address 1 deleted] amounting to \$2,262.86 in favour of Don Bruce Bogue Real Estate Limited. Attempts to enforce the debt proved fruitless

[2] On 13 July 2011 Tenancy Practice Services Limited, of which Mr Williams is a director, was instructed by Don Bruce to recover the debt. In Mr Williams' affidavit sworn on 5 November 2015 he set out the steps that his company had taken to get payment from Mr Viviane.

[3] Mr Williams' company became aware that Mr Viviane might have been renting [address 2 deleted] in which a large number of items were stored. Following an application for seizure to the District Court bailiffs entered the premises on 5

August 2015, acting on a warrant to seize property. They seized three industrial sewing machines and one Ryobi drill press. The warrant was for the sum of \$3,850.94.

Application

[4] On 18 August 2015 Wavenz Limited filed an application for third party claims. It claimed that all the equipment seized by the bailiffs was its property. Attached to the application were various certificates of incorporation, company extracts, change of names, change of directors, change in shareholding. Also attached was an agreement for sale and purchase of a business between Titan Sailmakers Limited and WavesailsNZ Limited the previous name of Wavenz Limited. The application claimed that all four items seized listed in the agreement for sale and purchase of the business.

[5] The application is opposed by the judgment creditor.

Evidence

[6] Two affidavits sworn by Mr Viviane on behalf of the company have been filed dated 19 November 2015 and 1 December 2015. The judgment creditor has filed two affidavits dated 5 November 2015 and 18 December 2015. No further affidavits have been filed.

[7] Three pre-trial telephone conferences have been held. Directions were made. Transcripts of those telephone conferences have been prepared. That is because Mr Viviane has always attended by phone from Australia. Mr Viviane was told on at least two occasions by Judge de Ridder that if he was going to call evidence in support of his application that affidavits would need to be prepared, sworn or affirmed and filed as well as served. Mr Williams for the judgment creditor was likewise advised.

Hearing

[8] The application was heard on 1 March 2016 by me. Mr Viviane had been given leave under s 168 of the Evidence Act by Judge de Ridder to attend by telephone. Mr Viviane has immigration issues which prevents him from currently returning to New Zealand. Mr Williams appeared for the judgment creditor company.

[9] Only Mr Viviane and Mr Williams gave evidence. The affidavits filed by both sides will be considered by me as part of the evidence.

The law

[10] The three sewing machines and drill were seized under s 85 of the District Courts Act 1947.

85 Warrant to seize property

- (1) A warrant to seize property shall require the bailiff or constable to whom it is directed to levy or cause to be levied such sum of money as is adjudged or ordered to be paid, or so much thereof as then remains unpaid, and also the costs of the execution, and of previous proceedings (if any) for the enforcement of the judgment or order, by seizure and sale of the goods and chattels of the person liable under the judgment or order, and the warrant shall authorise the bailiff or constable aforesaid to seize—
 - (a) Any of the goods and chattels of that person, except his necessary tools of trade to a value not exceeding \$500 and his necessary household furniture and effects, including the wearing apparel of himself and his family to a value not exceeding \$2,000; and
 - (b) Any money, bank notes, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to that person.
- (2) The Governor-General may from time to time, by Order in Council, amend subsection (1) of this section by increasing any amount specified in that subsection.
- (3) A warrant to seize property must be in a form approved by the chief executive of the Ministry of Justice.

[11] Section 94 – Third party claim process states:

(1) If a claim is made to or in respect of any goods or chattels seized in execution under a [warrant to seize property] issued by a [Court], or in respect of the proceeds or value thereof, the bailiff may, before or after the return of the warrant, and whether an action has been commenced against him for such seizure or not, obtain from the Registrar a summons calling before the Court the party at whose instance the process issued and the party making the claim.

.....

(2) Upon the issue of the summons any action brought in any [District Court] or other Court in respect of the claim or of any damage arising out of the execution of the warrant shall be stayed.(3)On the hearing of the summons, the [Judge] shall adjudicate upon the claim, and shall also adjudicate between the parties or either of them and the bailiff upon any claim to damages arising or capable of arising out of the execution of the warrant by the bailiff, and shall make such order in respect of any such claim and the costs of the proceedings as he thinks fit.

[12] As can be seen a party may bring a third party claim if they claim an interest in the property that has been seized in execution of a warrant. That is what Wavenz has done. It claims the property belongs to it, not to Mr Viviane personally.

Wavenz Limited

[13] WavesailsNZ Limited was incorporated on 30 June 2009. On 16 June 2010 Mr Viviane became the sole director and shareholder of the company. On 26 June 2014 WavesailsNZ Limited changed its name to Wavenz Limited. Mr Viviane remained the sole director and shareholder. The registered office of the company at that date was 212 Archers Road, Glenfield, Auckland. Sometime after 17 April 2014 the registered office of the company changed to 3 Te Kahu Street, Haruru Falls.

[14] Once incorporated, as this company was, the company continues to operate even if one of the essential requirements at the time of incorporation is no longer present; that is the director, Mr Viviane, has left New Zealand and it would appear is unable to return. The company derives its legal existence simply from the Registrar issuing a certificate. Following incorporation, a company continues in existence

until it was removed from the general register. Unlike a sole trader or a partnership, a company operates as a separate legal entity to its shareholders. It owns the assets and liabilities, whereas a sole trader owns them directly. I set this out more fully than normally as each of the parties has acted for themselves. Mr Viviane personally must be seen quite distinctive from Wavenz Limited even though he is in effect the “heart and soul” of the company.

Who has the burden of proof?

[15] The civil standard of proof is widely understood to require facts to be proved on the balance of probabilities, or shown as more probable than not. This might be described as meaning that the party whose case reaches a probability threshold of at least 51 per cent will meet the required standard of proof.¹ However, this standard may be “flexibly applied” as confirmed by *Z v Dental Complaints Assessment Committee*². This means that the court will take into account the seriousness of the alleged act or conduct and the potential consequences to the defendant if it is proved, when determining whether or not the standard has been reached.

[16] The claimant (WAVENZ Ltd) is ordinarily deemed to be the plaintiff in interpleader proceedings and thus has the burden of proving that the goods seized or the proceeds of such goods were its property. The enforcement creditor may rebut this by proving that the claimant has no title to the goods.

[17] Where, however, the goods when seized were in the possession of the claimant the enforcement creditor should be treated as the plaintiff, and the burden of proving that the goods were the property of the enforcement debtor rests upon the enforcement creditor.

[18] The onus of proof turns on whether or not the goods seized were in the possession of the claimant; if they were the execution creditor carries the onus, if they were not it rests with the claimant: *De la Rue v Hernu*³.

¹ See D Hamer “The Civil Standard of Proof Uncertainty: Probability, Belief and Justice” (1994) 16 Syd LR 506 at 509.

² [2008] NZSC 55, [2009] 1 NZLR 1

³ [1936] 2 KB 164

[19] The property seized was in a unit rented from Mr R E Larcombe. The rental agreement has been produced by both parties as annexures to their affidavits. The premises are described as a factory unit. The use of the premises are sail making and canvas work. It is dated 17 April 2013. Mr Viviane contends he signed the rental agreement as a director of his company. The company name was not filled in as the company was going through a change of name.

[20] Mr Williams said that the agreement was entered in to by Mr Viviane personally. That is what the contract on its face states. Therefore all the items within that unit are in the possession of Mr Viviane. Therefore Wavenz must be the one proving that the three sewing machines and one drill press were the property of the company not him personally.

What is the competing evidence?

[21] Mr Viviane in his affidavit of 1 December 2015 deposed:

I am attaching to this affidavit the following documents listed below to support my third party claim over the seized company property and provide evidence the address and property were the items that were seized from is in fact the factory/workshop and offices of Wavenz Limited previously registered as Wave Sails NZ Limited and trading as Wave Sails.

[22] He annexed the rental agreement, the first receipt that was issued for payment and a letter which on the face of it is dated 11 November 2015 from the landlords.

[23] The difficulty with Mr Viviane is that he moves from speaking on his own behalf, that is personally, and then as the sole director of the company. He uses the phrases,

“I consider my landlord has been induced”; “I have registered the occurrence and filed a complaint with the Police and served trespass notices on all parties relating to the judgment creditor. I am laying charges against Scotney Craeg Williams for trespass. The judgment creditor approached my landlord....”

[24] If Mr Viviane was acting at all times on behalf of his company he should not have used such language. He should have said the judgment creditor approached my company’s landlord; my company considers its landlord has been induced.

[25] The rental agreement is in Mr Viviane's own name. It is signed by him as tenant not as director of a company. The receipt is to him personally. Where a company enters in to contracts it should do so so that the world at large can see that it is the company that the person is dealing with. To write in TBA next to the portion company name is in my view insufficient.

[26] Mr Viviane's explanation that the company was in the process of changing names does not find favour with me. A company must have a name until the point it is changed. Up until that point the current company name must be used. He knew at that time I find from all the information in the affidavit, that he knew he was changing the name of the company and what that name would be.

[27] Whilst I accept, as indeed does the judgment creditor, that Mr Viviane's company was using the premises primarily to carry on its business there is some suggestion that Mr Viviane was personally living in the premises. He said before me "since I bought this company for the last four years I have been living inside this shed, I have been sleeping on the table or under the table...".

[28] I disregard the letter if it can be called that purportedly from the landlord. Mr Viviane was well aware as a director of the company that he was required to file an affidavit by Mr Larcombe. It is not acceptable for other evidence to be attached to other person's affidavits. Mr Viviane's explanation to me that Mr Larcombe had more pressing business matters than to come to Court does overlook that he had been directed to file any affidavits by a certain date then given an extension of time for the filing of affidavits. He chose over that entire period not to get Mr Larcombe to swear an affidavit. His suggestion that I, as the trier of fact, telephone Mr Larcombe is unacceptable. I have put that letter to one side.

[29] I find that the premises were leased by Mr Viviane in his personal capacity. That being so it is for the claimant, Wavenz Limited, to assume the burden of proving that the goods seized were its.

Who was the owner of the property that has been seized?

Sewing machines

[30] Wavenz Limited having the onus has it established that the three sewing machines belong to it and not to Mr Viviane personally?

[31] I am satisfied on the balance of probability that the claimant has established. The sale and purchase agreement which is in the form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society for the sale and purchase of a business. It is dated 8 July 2009. It is between Titan Sail Makers Limited and WavesailsNZ Limited, the previous name for the Applicant. It has annexed to it a list of plant that was sold as part of the agreement and includes five sewing machines, three which were seized by the bailiffs. Mr Williams agreed that these items were in the document in the sale and purchase agreement but submitted that in itself is not a document of title. I disagree. An agreement for sale and purchase in writing on the standard form which annexes the plant including the three sewing machines which are specialist sail sewing machines is sufficient to prove that ownership in those items were transferred.

[32] Added to that is Mr Viviane's evidence, on behalf of his company, that the three sewing machines belonged to the company, were used by the company in its business, were set up as part of the business.

Result

[33] I find that the three sewing machines were the property of Wavenz Limited.

Drill

[34] The drill is in a different category. As Mr Viviane accepted in his evidence the drill is not listed in the agreement for sale and purchase. He said there was a document in New Zealand which showed that the company purchased it. That company document was never produced to me. Mr Viviane had ample opportunity to do so, even with his difficulties of having to reside in Australia. Unlike the

sewing machines there is no direct evidence as to what purpose the drill had. I could infer that as they were in the premises along with the sewing machines that they were used in the company's business. However there appears to be other items, hundreds which according to Mr Williams' evidence, which I accept, not all of which would be company property.

[35] To find in favour of Wavenz I must accept Mr Viviane's evidence that it is more probable than not that the drill belonged to the company. I have real difficulties with Mr Viviane's veracity. I caution myself about deciding a case on the demeanour of any witness. That is particularly so where Mr Viviane appeared, if one can call it that, by way of telephone from Australia. However his affidavits and other information that he has forwarded to the Court as well as what he said during the hearing lead me firmly of the view that Mr Viviane expects everyone to take him at his word. I do not. He was aggressive. He would not listen. He did not produce any documents to support his company's claim to the drill.

[36] I consider that Wavenz has not discharged the burden on it through the evidence of its director and shareholder that the drill belonged to it.

Result

[37] I find that the three sewing machines are the property of Wavenz Limited.

[38] I find that the drill is the personal property of Mr Viviane.

D J McDonald
District Court Judge